No. 81-89

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WALTER ZANT, WARDEN,
Petitioner,

v.

ALPHA OTIS O'DANIEL STEPHENS,
Respondent.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1.

When a death penalty is imposed on the basis of a plurality of aggravating circumstances, each of which has been established beyond a reasonable doubt, is the death penalty to be set aside because one of these aggravating circumstances is set aside?

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OPINIONS BELOW

The opinion of the Court of Appeals is reported as Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980). (Appendix 1). The opinion of the Court of Appeals on

rehearing is not yet reported. See Stephens v. Zant, ___ F.2d ___ (5th Cir. 1981). (Appendix 64). The opinion of the District Court dismissing the writ of habeas corpus is an unreported decision. See Stephens v. Zant, 79-30-MAC (M.D. Ga. May 11, 1979). (Appendix 50).

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered November 26, 1980. See Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980). A timely petition for rehearing and rehearing en banc was filed, and that Court entered a judgment June 18, 1981. See Stephens v. Zant, ___ F.2d ___ (5th Cir. 1981). This petition for certiorari has been filed within the allowable ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fourteenth Amendment, United States Constitution:

> ". . . nor shall any State deprive any person of life, liberty, or property without due process of law . . ."

28 U.S.C. § 2254(a):

> ". . . a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to a judgment of a State Court only on the ground that he is in custody in violation of the Constitution of laws . . . of the United States."

STATEMENT OF THE CASE

Respondent Alpha Otis O'Daniel Stephens was tried January 20-21, 1975, in the Superior Court of Bleckley County, Georgia, for the murder of Roy Asbell, and the jury found him guilty. During the sentencing phase of the trial, Respondent's prior convictions for motor vehicle theft, six counts of burglary, three counts of armed robbery, kidnapping with bodily injury, and murder were introduced into evidence.

The jury found three aggravating circumstances and recommended the death penalty:

(1) Respondent had a prior record of conviction for a capital felony, see Ga. Code Ann. § 27-2534.1(b)(1);

(2) Respondent had a substantial history of serious assaultive convic-

tions, see Ga. Code Ann. § 27-2534.1(b)(1);

(3) Respondent was on escape when he committed the murder, see Ga. Code Ann. § 27-2534.1(b)(9).

After Respondent was tried but before his appeal was final, the Georgia Supreme Court held that the portion of Ga. Code Ann. § 27-2534.1(b)(1), which allows the death penalty where a murder is committed by a person with a substantial history of assaultive convictions, is unconstitutional. Arnold v. State, 236 Ga. 534, 542, 224 S.E.2d 386 (1976). Nevertheless, the Georgia Supreme Court upheld Respondent's death penalty because the evidence supported the jury's findings of the other two aggravating circumstances. Stephens v. State, 237 Ga. 259, 261-62, 227 S.E. 2d 261 (1976), cert. denied 429 U.S. 986 (1977).

On Respondent's State habeas appeal, the Georgia Supreme Court again held that the fact the jury was allowed to consider an aggravating circumstance later held to be unconstitutional did not require the vacating of the death penalty. Stephens v. Hopper, 241 Ga. 596, 603-04, 247 S.E. 2d 92 (1978), cert. denied 439 U.S. 991 (1978).

The District Court of the Middle District of Georgia denied federal habeas corpus relief. Stephens v. Zant, 79-30-MAC (M.D. Ga. May 11, 1979). However, the Fifth Circuit Court of Appeals vacated Respondent's death penalty on appeal. Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980). Upon Warden Zant's timely petition for rehearing and rehearing en banc, that Court changed one paragraph of the prior opinion but the petition for rehearing and

rehearing en banc were denied. Stephens v. Zant, ___ F.2d ___ (5th Cir. 1981).

REASON FOR GRANTING THE WRIT

WHERE A DEATH PENALTY IS IMPOSED ON THE BASIS ON A PLURALITY OF AGGRAVATING CIRCUMSTANCES, EACH OF WHICH HAS BEEN ESTABLISHED BEYOND A REASONABLE DOUBT, THE DEATH PENALTY SHOULD NOT BE SET ASIDE BECAUSE ONE OF THESE AGGRAVATING CIRCUMSTANCES IS SET ASIDE.

This case presents a clear and direct conflict between the Fifth Circuit Court of Appeals and the Georgia Supreme Court, which should be resolved by this Court.

The law in Georgia is well-settled that if a death penalty is imposed on the basis of a plurality of aggravating circumstances, each of which has been established beyond a reasonable doubt, the death penalty will not be set aside because one of these aggravating circum-

stances is set aside. Stevens v. State, ___ Ga. ___, ___ S.E.2d ___ (No. 36943 June 2, 1981); Hamilton v. State, 246 Ga. 264 n. 1, 271 S.E.2d 173 (1980), cert. denied ___ U.S. ___ (1981); Brooks v. State, 246 Ga. 262, 263, 271 S.E.2d 172 (1980), cert. denied ___ U.S. ___ (1981); Collins v. State, 246 Ga. 261, 262, 271 S.E.2d 352 (1980), cert. denied ___ U.S. ___ (1981); Burger v. State, 245 Ga. 458, 460-61, 265 S.E.2d 797 (1980), cert. denied 446 U.S. 988 (1980); Dampier v. State, 245 Ga. 427, 883 n. 1, 265 S.E.2d 565 (1980), cert. denied ___ U.S. ___ (1980); Gates v. State, 244 Ga. 587, 599, 261 S.E.2d 349 (1979), cert. denied 445 U.S. 938 (1980); Stephens v. Hopper, 241 Ga. 596, 603-04, 247 S.E.2d 92 (1978), cert. denied 439 U.S. 991 (1978); Stephens v. State, 237 Ga. 259, 261-62, 227 S.E.2d 261 (1976), cert. denied 429 U.S. 986 (1977).

"[T]he Georgia Supreme Court's position is clear, and . . . I consider it consistent with this Court's decisions." Westbrook v. Balkcom, ___ U.S. ___, 101 S.Ct. 541, 543, 66 L.Ed.2d 298 (1980) (J. Stevens concurring).

Georgia's death penalty statute was upheld in Gregg v. Georgia, 428 U.S. 153 (1976). This Court upheld Gregg's death penalty even though the jury had been allowed to impose a death penalty for armed robbery. Id. at 161-62. The Georgia Supreme Court had ruled that the death penalty for armed robbery was disproportionate, Gregg v. State, 233 Ga. 117, 210 S.E.2d 659 (1974); yet the fact the jury considered and imposed a death penalty for armed robbery did not require that the death penalty for murder be vacated.

In vacating Respondent's death penalty, the Fifth Circuit Court of Appeals relied primarily on the authority of Stromberg v. California, 283 U.S. 359 (1931); accord, Bachellar v. Maryland, 397 U.S. 564 (1970); Street v. New York, 394 U.S. 576 (1969); Yates v. United States, 354 U.S. 298 (1957). In Stromberg v. United States, supra, at 367-68, this Court noted that where there was a general verdict of guilty, which could have rested on three grounds, one of which was unconstitutional, it was impossible to tell on which ground the verdict rested and the conviction had to be set aside. Bachellar v. Maryland, supra; Street v. New York, supra; and Yates v. United States, supra, all involved general verdicts of guilty, each of which could have been based on an unconstitutional ground.

The penalty verdict at Respondent's trial was not a general verdict, and the jury found two aggravating circumstances. The Court of Appeals admitted that there was "no uncertainty" as to the two valid aggravating circumstances and either circumstance "by itself would be legally sufficient to permit the jury to impose the death penalty." Stephens v. Zant, 631 F.2d 397, 406 (5th Cir. 1980).

Originally the Court of Appeals held that "[t]he presence of the unconstitutionally vague aggravating circumstance made it possible for the jury to consider several prior convictions of . . . [Respondent] which otherwise would not have been before it." Id. Warden Zant pointed out that this was an incorrect statement of Georgia law, as all of the accused's prior convictions are admissible

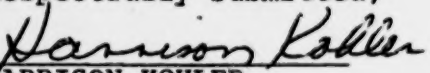
during the sentencing phase of the trial. Hughes v. State, 239 Ga. 393, 397-98, 236 S.E.2d 829 (1977). The Court of Appeals modified the holding but denied the petition for rehearing and rehearing en banc. Stephens v. Zant, ___ F.2d ___ (5th Cir. 1981).

The decision of the Court of Appeals conflicts with well-settled law of the Georgia Supreme Court, with this Court's actions in denying petitions for writs of certiorari from the Georgia Supreme Court, and with this Court's reasoning in Gregg v. Georgia, 428 U.S. 153, 161-62 (1976).

CONCLUSION

For all the previously stated reasons, a petition for writ of certiorari should be granted by this Court.

Respectfully submitted,



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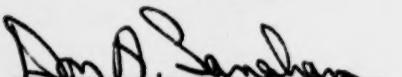

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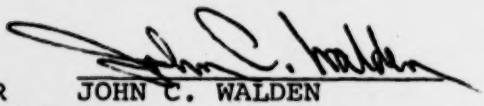

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CERTIFICATE OF SERVICE

I, Harrison Kohler, Attorney of Record for the Petitioner and a member of the Bar of the Supreme Court of the United States, certify that in accordance with the Rules of the Supreme Court of the United States, I have served three copies of this Petition for Writ of Certiorari upon the Respondent by depositing this petition in the United States Mail with sufficient, first-class postage affixed and addressed to counsel for Respondent as follows:

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This 14th day of July, 1981.

Harrison Kohler

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APPENDIX

ALPHA OTIS O'DANIEL STEPHENS,

Petitioner-Appellant,

v.

WALTER ZANT, SUPERINTENDENT,

Respondent-Appellee.

No. 79-2407.

United States Court of Appeals
Fifth Circuit.

Nov. 26, 1980.

Appeal from the United States District Court for the Middle District of Georgia.

Before INGRAHAM, RONEY, and THOMAS A. CLARK, Circuit Judges.

RONEY, Circuit Judge.

Petitioner, convicted of murder and sentenced to death by the State of Georgia, appeals from a denial of a writ of habeas corpus. Petitioner contends his conviction violates the Double Jeopardy Clause

and his sentence is invalid under the Eighth Amendment because closing arguments were not transcribed, the jury was not properly instructed that it could recommend a life sentence if it found aggravating circumstances, and the jury was permitted to consider an unconstitutional aggravating circumstance. Although we reject his other contentions, we agree that because the jury considered an unconstitutional aggravating circumstance, petitioner's death sentence cannot stand.

In August of 1974, petitioner escaped from jail where he was serving sentences for earlier burglary convictions. He committed a number of crimes in Twiggs County, Georgia. While petitioner and an accomplice were burglarizing a house, Roy Asbell drove up in his car. Petitioner forced Asbell at gunpoint from the car,

hit him several times in the face and took a large sum of money from him. Petitioner then forced Asbell back into the car and drove him approximately three miles, across the county line into Bleckley County. There, petitioner killed Asbell by shooting him twice in the head at close range.

Shortly thereafter petitioner was apprehended and was indicted by the Twiggs County grand jury for motor vehicle theft, armed robbery and kidnapping with bodily injury. Petitioner pleaded guilty in Twiggs Superior Court and was sentenced to ten years for motor vehicle theft and to life sentences for armed robbery and kidnapping.

Afterwards petitioner was indicted in Bleckley County for the murder of Roy Asbell, found guilty and sentenced to

death. His conviction and sentence were affirmed on direct appeal to the Georgia Supreme Court. Stephens v. State, 237 Ga. 259, 227 S.E.2d 261, cert. denied, 429 U.S. 986, 97 S.Ct. 508, 50 L.Ed.2d 598 (1976). His state petition for a writ of habeas corpus was denied. Stephens v. Hopper, 241 Ga. 596, 247 S.E.2d 92, cert. denied, 439 U.S. 991, 99 S.Ct. 593, 58 L.Ed.2d 667 (1978). Petitioner then sought a writ of habeas corpus in federal court, alleging the same constitutional flaws as were raised in state court. The district court denied relief. Petitioner appeals, his execution having been stayed pending appeal.

Petitioner asserts four errors in his conviction and sentence: (1) jeopardy for the murder charge attached when he pleaded guilty to the kidnapping charge and therefore his subsequent murder trial

was constitutionally barred; (2) the court failed to transcribe closing arguments and voir dire; (3) the instruction to the jury did not adequately charge that they could still impose life imprisonment even if they found aggravating circumstances that would justify the death sentence; and (4) when one of the three aggravating circumstances found by the jury was later declared unconstitutionally vague, the sentence should not have been affirmed on the basis of the other two.

I. DOUBLE JEOPARDY

The Twiggs County indictment for kidnapping recited that he killed the kidnap victim. The third count reads as follows:

COUNT III

And the aforesaid Grand Jurors... charge and accuse Alpha Otis O'

Daniel Stephens...with the offense of KIDNAPPING for that the said Alpha Otis O'Daniel Stephens... in the county aforesaid...did unlawfully and with force and arms abduct and steal away Roy Asbell, a person, without lawful authority, and held Roy Asbell against his will and did physically abuse and did inflict and cause bodily injury to the body of Roy Asbell by beating, hitting and kicking Roy Asbell and did threaten to kill Roy Asbell and then did kill Roy Asbell by shooting Roy Asbell, contrary to the laws of said State...

Petitioner argues that by stating that in the course of the kidnapping he killed Asbell, the State unwittingly

accused him of the crime of murder because the indictment alleged all the elementsof murder. When he pled guilty under Count III of the Twiggs indictment, he admitted every fact averred in the indictment. At that point, his argument continues, he ran the risk - i.e., was placed in jeopardy - of a conviction of murder under a felony - murder theory. Since under Georgia law felony murder and malice murder are different ways in which one offense may be committed, Leutner v. State, 235 Ga. 77, 218 S.E.2d 820 (1975), he argues the State was barred by the Double Jeopardy Clause from prosecuting him for malice murder in Bleckley County.

The Supreme Court of Georgia responded to petitioner's argument by holding that malice murder and kidnapping are not the same in law or in

fact and thus are not the same offense under state law. It also determined that the state legislature intended, under the test in Ga. Code Ann. §§ 26-505 to 507, to permit multiple prosecutions and punishments in a case such as this. Stephens v. Hopper, 241 Ga. at 598-600, 247 S.E.2d at 94-95. Cf. Whalen v. United States, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980) (holding that the Double Jeopardy Clause prohibits courts from imposing greater penalties than the legislature intended).

While this is the definitive interpretation of Georgia law and binding upon this Court, Mullaney v. Wilbur, 421 U.S. 684, 691, 95 S.Ct. 1881, 1885, 44 L.Ed.2d 508 (1975), the holding does not adequately respond to petitioner's argument. Petitioner's contention is not that kid-

napping and malice murder are the "same offense." Rather, he asserts that felony murder was charged in the indictment, that by pleading guilty he was placed in jeopardy of conviction for that crime and therefore the state is barred from any further attempt to prosecute him for murder.

[1,2] Petitioner's contention that he was placed in jeopardy of a conviction for murder in Twiggs County is erroneous, because there was no jurisdiction in that county to try him for the homicide. The rule is absolute that a person is not put in jeopardy unless the court in which he was tried the first time had jurisdiction to try him for the charge the person now seeks to avoid. The Supreme Court has twice spoken to the point.

We assume as indisputable, on principle and authority, that before a person can be said to have been put in jeopardy of life or limb the court in which he was acquitted or convicted must have had jurisdiction to try him for the offense charged.

Graftonv. United States, 206 U.S. 333, 345, 27 S.Ct. 749, 751, 51 L.Ed. 1084 (1907).

> An acquittal before a court having no jurisdiction is, of course, like all the proceedings in the case, absolutely void, and therefore no bar to subsequent indictment and trial in a court which has jurisdiction of the offense.

United States v. Ball, 163 U.S. 662, 669, 16 S.Ct. 1192, 1194, 41 L.Ed. 300 (1896).

The Georgia Constitution requires that, unless an impartial jury cannot be obtained, "all criminal cases shall be tried in the county where the crime was committed." Ga. Const. Art. VI, § XIV, ¶ VI (Ga. Code Ann. § 2-4306). The Supreme Court of Georgia specifically held in this case that the Twiggs County court did not have jurisdiction to try the murder offense. Stephens v. Hopper, 241 Ga. at 599, 247 S.E.2d at 95. The Fifth Circuit held in Tennon v. Ricketts, 574 F.2d 1243, 1245 (1978), cert. denied, 439 U.S. 1091, 99 S.Ct. 874, 59 L.Ed.2d 57 (1979), that "it is for the Georgia Supreme Court, not this Court, to expound the decisional rules of that, jurisdiction." Accord, Hortonville Joint School District No. 1 v. Hortonville Education Assn., 426 U.S. 482, 488, 96 S.Ct. 2308, 2312, 49 L.Ed.2d 1 (1976); Mullaney v. Wilbur, 421 U.S.

684, 691, 95 S.Ct. 1881, 1885, 44 L.Ed.2d 508 (1975); Eisenstadt v. Baird, 405 U.S. 438, 441-42, 92 S.Ct. 1029, 1032, 31 L.Ed.2d 349 (1972) (all holding that the highest state court is the final authority on questions of state law and federal courts are bound to accept its interpretation of state law).

[3] The question of the jurisdiction of a state trial court in a state criminal prosecution is clearly a question of state law, which binds this Court. Since the Twiggs Superior Court had no jurisdiction to hear the murder offense, petitioner was not placed in jeopardy of a murder conviction, under either a malice murder or felony murder theory, in the Twiggs County proceedings.

[4] Petitioner was, however, placed in jeopardy for the offense of

kidnapping with bodily injury. The Double Jeopardy Clause bars a subsequent prosecution for any offense deemed the "same offense" under the test in Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932).

> [W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

The Supreme Court held in Brown v. Ohio, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977), that a lesser or greater included offense is the "same offense" for double jeopardy purposes. It thus

becomes necessary to determine whether petitioner's murder conviction was for the "same offense" as his kidnapping charge.

[5] Malice murder and kidnapping with bodily injury have separate and distinct elements and require proof of different facts. Kidnapping consists of abducting another unlawfully and against his will, plus inflicting some bodily injury. Malice murder consists of killing another with malice aforethought. Thus, even if they involve the same transaction and considerably overlap each other factually, they are not the "same offense" under Blockburger. In addition, as found by the Georgia Supreme Court, the Georgia legislature intended multiple punishment for kidnapping and malice murder in a case such as this. Stephens

v. Hopper, 241 Ga. at 599-600, 247 S.E.2d at 95-96.

[6,7] As felony murder is defined under Georgia law, the underlying factor is a lesser included offense of felony murder and thus the same offense under Blockburger. See Young v. State, 238 Ga. 548, 233 S.E.2d 750 (1977); Reed v. State, 238 Ga. 457, 233 S.E.2d 369 (1977). Once the State tried and convicted petitioner for kidnapping, it would be barred from prosecuting him for felony murder only if the underlying felony upon which that prosecution was based were that same kidnapping. Illinois v. Vitale, ___ U.S. ___, 100 S.Ct. 2260, 65 L.Ed.2d ___. See Whalen v. United States, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715; Harris v. Oklahoma, 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977).

[8] We have examined the record closely to see whether the Bleckley County murder prosecution was based in any part on a theory of felony murder with the underlying felony being the kidnapping of Roy Asbell. The record clearly shows that petitioner was indicted, tried and convicted solely on the grounds that he committed murder with malice aforethought. The trial judge specifically instructed the jury on the requirement of malice.

> I further charge you that on the trial of a defendant for the offense of Murder the burden is on the State to prove malice, either expressed or implied, and unless the State proves malice beyond a reasonable doubt there can be no verdict of guilty of Murder, and you should acquit of that charge. For as I said, there can be no Murder without malice.

Where, as here, it is clear petitioner was tried and convicted for malice murder and that crime was not the "same offense" as the kidnapping with bodily injury for which he was convicted in the first proceeding, the Double Jeopardy Clause does not bar the malice murder conviction regardless of whether malice murder and felony murder are the "same offense" under the Blockburger test. Petitioner's double jeopardy argument is accordingly rejected.

II. INCOMPLETE TRANSCRIPT

The transcript in petitioner's murder trial does not include the closing and sentencing arguments of counsel or the voir dire of the jury. It appears that the entire trial was recorded by the court reporter. The customary practice in that court, however, was that voir dire and closing arguments were not transcribed

in the absence of a request by the State or the defendant. Both of petitioner's attorneys were familiar with that practice but neither they nor the State requested that those portions of the trial be transcribed. Trial counsel were also informed by the trial judge that if they had any objections to the arguments, the objectionable portion of the argument and the objection would be transcribed. No objections were made. Thus, no part of closing arguments was transcribed.

At the time of petitioner's initial appeal to the Supreme Court of Georgia, the trial judge submitted as part of the record on appeal the detailed, seven-page questionnaire required by Ga. Code Ann. § 27-2537(a) and described in Gregg v. Georgia, 428 U.S. 153, 211-12, 96 S.Ct. 2909, 2942-43, 49 L.Ed.2d 859 (1976) (White, J., concurring). That ques-

tionnaire provided a comprehensive summary of the trial and a profile of the defendant.

An affidavit of the trial judge was received at the habeas corpus hearing in state court. In that affidavit the trial judge made the following statement.

> In his closing argument, [the district attorney] factually summarized the evidence in the case. He made no allusions to race nor did he use any epithet in referring to Stephens. I recall no statement by [the district attorney] that was inflammatory or that injected passion or prejudice into the trial of Stephens.

Petitioner has not alleged that anything erroneous, inflammatory or

prejudicial occurred in the untranscribed portion of the trial. As he stated in his brief, there is nothing to indicate that there was anything of special importance in that part of the trial. His contention, simply stated, is that a death sentence cannot constitutionally be affirmed when the transcript before the reviewing court does not contain the proceedings of the entire trial.

Petitioner relies principally on Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1976). In Gardner, the defendant was convicted of first degree murder and the jury recommended a life sentence. The trial judge did not accept the advisory verdict of the jury, but instead, on the basis of a presentence report, imposed the death penalty. The confidential portion of the presentence report was shown neither

to counsel nor to the defendant, and neither requested to see it. The judge did not state on the record the substance of the material contained in the report. The report was also omitted from the record on appeal. The plurality opinion of Justice Stevens, joined by two other justices, found that this procedure violated the Due Process Clause and vacated the sentence.

[9,10] Gardner does not establish the per se rule that petitioner attributes to it. The decisive test is the one suggested by the plurality's statement that the procedure on appeal should be "[ ] consistent with the basis upon which the [state's] capital-sentencing procedure was upheld." Id. at 360 n. 11, 97 S.Ct. at 1205. This Court must examine Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909,

49 L.Ed.2d 859, to determine the basis upon which Georgia's capital-sentencing procedure was upheld and thereby identify the function the Georgia Supreme Court's review is to play in that procedure. If the record presented to the Georgia Supreme Court was so deficient that it would be impossible for that court to perform the function required of it under Gregg, or would create "a substantial risk" that the penalty is being inflicted in an arbitrary and capricious manner, id. at 188, 96 S.Ct. at 2932, petitioner's sentence cannot be permitted to stand. This analysis is especially appropriate where, as here, the case was tried and appealed before the decision in Gregg.

In discussing the automatic appeal of death-sentence cases to the Georgia Supreme Court, the Gregg plurality identified the role of that court in

reviewing death sentences.

> That court is required by statute to review each sentence of death and determine whether it was imposed under the influence of passion or prejudice, whether the evidence supports the jury's finding of a statutory aggravating circumstance, and whether the sentence is disproportionate compared to those sentences imposed in similar cases.

Id. at 198, 96 S.Ct. at 2936.

Several considerations convince us that the record on appeal to the Georgia Supreme Court was adequate to permit that court to make the determininations required of it under Gregg. For the reasons set out below, we hold that Gardner is not controlling here and that petitioner's

sentence should not be overturned on this ground. First, the report in Gardner was clearly the key element in the decision to impose the death penalty, for it contained "the factual basis for the judge's rejection of the advisory verdict." 430 U.S. at 362, 97 S.Ct. at 1206. Without it, it was impossible for the state supreme court to determine whether the state was "administer[ing] its capital-sentencing procedures with an even hand." Id. at 361, 97 S.Ct. at 1206. In this case, however, the bases for the imposition of the death penalty are set forth in the record, and the record is more than adequate to permit the state court to determine whether the death penalty was imposed with an even hand.

Second, the plurality in Gardner was obviously distrubed by defense counsel's

lack of opportunity to comment on and object to the portion or the report not in the record, and to challenge the accuracy or materiality of the information it contained. Honest and robust debate between adversaries is essential in foreclosing the possibility, in both fact and appearance, for the intrusion of caprice, emotion, and other arbitrary influences in the truth-seeking process. In the absence of such debate, it may be difficult to achieve accuracy and avoid the appearance of arbitrariness. In the present case, all proceedings took place in open court and all counsel had a full opportunity to comment on and challenge those proceedings. The appearance of arbitrariness is thus not a factor here as it was in Gardner.

Third, unlike in Gardner, there is affirmative evidence here that the con-

viction and sentence were based on the evidence presented and transcribed. The State has come forward with affirmative and uncontroverted proof that in the untranscribed arguments the district attorney merely factually summarized the evidence in the case. In addition, the jurors were twice instructed to base their decision on the facts and inferences presented in the evidence. The failure of petitioner's attorneys to make any objection to the argument must also be seen as further evidence that there was no injection of anything prejudicial to petitioner and that the jury received the case solely on the basis of the evidence.

Fourth, the Georgia Supreme Court had before it in this case the detailed report of the trial judge on the defendant and the trial. At least three jus-

tices in Gregg felt the presence of this report was a significant factor in the state supreme court's review function.

> An important aspect of the new Georgia legislative scheme, however, is its provision for appellate review. Prompt review by the Georgia Supreme Court is provided for in every case in which the death penalty is imposed. To assist it in deciding whether to sustain the death penalty, the Georgia Supreme Court is supplied, in every case, with a report from the trial judge in the form of a standard questionnaire. . . . The questionnaire contains, inter alia, six questions designed to disclose whether race played a role in the

> case and one question asking the trial judge whether the evidence forecloses "all doubt respecting the defendant's guilt."

Id. at 211-12, 96 S.Ct. at 2942-43 (opinion of White, J., joined by Burger, C. J. and Rehnquist, J.). No such report was available to the state supreme court in Gardner.

Fifth, as noted above, petitioner has neither alleged nor offered any evidence that he was actually prejudiced by anything said in the untranscribed portion of the trial or by the failure to make the transcription. Both petitioner and one of his trial attorneys were present at the habeas corpus hearing in the Superior Court and neither suggested anything that was harmful, erroneous, inflam-

matory, or prejudicial. See Clayton v. Blackburn, 578 F.2d 117 (5th Cir. 1978).

[11] The presence of these factors persuades us that the record as a whole adequately meets "the need for reliability in the determination that death is the appropriate punishment in [this] specific case," Woodson v. North Carolina, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976) (opinion of Stewart, Powell and Stevens, JJ.), and that the capital-sentencing procedures have been administered with an even hand. See Gardner v. Florida, 430 U.S. at 361, 97 S.Ct. at 1206; Proffitt v. Florida, 428 U.S. 242, 250-53, 96 S.Ct. 2960, 2965-67, 49 L.Ed.2d 913 (1976) (opinion of Stewart, Powell and Stevens, JJ.). The state of the record reviewed by the Georgia Supreme Court was adequate to permit it to complete the review functions required of that court

under Gregg and to ensure that there was no substantial risk that the death sentence was arbitrarily imposed. Accordingly, we hold that in this case the failure to transcribe counsel's arguments is not a constitutional violation requiring petitioner's sentence to be vacated.

Our holding should not be construed to suggest that we condone the failure of the trial court to transcribe the entire proceedings in a death penalty case. We note that the Supreme Court of Georgia has directed that the argument of counsel should henceforth be transcribed in all cases in which the death penalty is sought. Stephens v. Hopper, 241 Ga. at 600, 247 S.E.2d at 95.

[12] The question whether voir dire was properly conducted was considered by the Supreme Court of Georgia on

direct appeal. Stephens v. State, 237 Ga. 259, 227 S.E.2d 261. That court ordered the trial record to be supplemented. From the extensive notes he made during the trial, the judge filed a five-page supplement to the record on the voir dire issue, and that supplement was acknowledged by counsel. The detailed supplement clearly presented to the Supreme Court of Georgia the opportunity to consider any possible error or any injection of arbitrariness. Petitioner shows no prejudice from the failure to transcribe voir dire.

[13] The supplement also shows that the only potential juror expressing conscientious objection to the death penalty was struck by the State using one of its peremptory challenges. There is thus no Witherspoon issue in this appeal. See

Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968).

III. IMPROPER JURY INSTRUCTION

Petitioner contends that, while the jury was instructed in the sentencing phase of the trial that it must find at least one statutory aggravating circumstance before it could impose a death sentence, it was not instructed that even if it found such a circumstance it need not impose death.

[14] When an appellate court reviews the adequacy of an instruction to the jury, it must view the charge as a whole. Cupp v. Naughten, 414 U.S. 141, 146-47, 94 S.Ct. 396, 400, 38 L.Ed.2d 368 (1973); United States v. Brooks, 611 F.2d 614, 619 (5th Cir. 1980). Only when the charge

taken in its entirety fails to fairly present the issues to the jury will error be found. United States v. Chandler, 586 F.2d 593, 606 (5th Cir. 1978), cert. denied, 440 U.S. 927, 99 S.Ct. 1262, 59 L.Ed.2d 483 (1979).

[15] In his charge to the jury, the trial judge instructed them that they were to consider all the evidence of the case, including evidence of mitigation and aggravation. He told the jury that unless one of the statutory aggravating circumstances was found to be proven beyond a reasonable doubt, they would not be authorized to impose a death penalty. He then specified which aggravating circumstances they could consider. He told them that if they wished to recommend mercy, they did not have to recite any mitigating or aggravating circumstances they might find. He concluded by instructing them

how to fill out the forms.

Considering the charge as a whole, it is clear that the issue was fairly presented to the jury. The clear implication of the charge is that the jury could recommend mercy without stating what mitigating or aggravating circumstances could be present and yet the jury could still be free to impose life imprisonment. Petitioner's contention is rejected.

IV. AGGRAVATING CIRCUMSTANCES

The trial judge permitted the jury to consider four statutory aggravating circumstances: (1) the offense was committed by one who had escaped from lawful custody, Ga. Code Ann. § 27-2534.1(b)(9); (2) the offense was committed by one having a prior conviction for a capital felony,

id. § 27-2534.1(b)(1); (3) the offense was committed by one having a substantial history of serious assaultive criminal convictions, id.; or (4) the offense was outrageously or wantonly vile, horrible or inhuman, id. § 27-2534.1(b)(7). The jury found the first three to be present but not the fourth.

Following trial and before petitioner's case was reviewed by the Supreme Court of Georgia, that court declared aggravating circumstance (3), commission by one having a substantial history of serious assaultive criminal convictions, to be unconstitutionally vague. Arnold v. State, 236 Ga. 534, 224 S.E.2d 386 (1976). After eliminating that circumstance from consideration of petitioner's appeal, the Georgia court in this case found the evidence supported the jury's findings of the other statutory aggravating circum-

stances and held that the sentence was not impaired. Stephens v. State, 237 Ga. at 261-62, 227 S.E.2d at 263.

In his state habeas corpus petition, petitioner contended that aggravating circumstance (2), commission by one having a prior conviction for a capital felony, was also invalid because he was under no such conviction at the time the crime was committed although he was admittedly under conviction for a capital felony at the time of his murder trial. The Supreme Court of Georgia interpreted the statute, Ga. Code Ann. § 27-2534.1(b)(1), as requiring that the jury should consider his record as of the time of sentencing. Accordingly, petitioner's contention was rejected. Stephens v. Hopper, 241 Ga. at 602-03, 247 S.E.2d at 96-97.

[16] On appeal to this Court, petitioner argues that the presence of unconstitutional aggravating circumstance (3) before the jury and the questionable interpretation of aggravating circumstance (2) create such potential for the intrusion of arbitrary influences into his sentence as to violate his constitutional rights and require his sentence to be vacated. The Supreme Court of Georgia is the ultimate authority on the law of Georgia and we are not permitted to question its interpretation of that State's statutes. Tennon v. Ricketts, 574 F.2d at 1245. We must therefore treat circumstance (2) as it is interpreted by the Georgia Supreme Court.

The question presented, then is wehther the death penalty was invalid under the Constitution because it was

imposed when one of the aggravating circumstances was later held to be unconstitutional even though there were two other aggravating circumstances, either of which by itself would be legally sufficient to permit the jury to impose the death penalty and as to both of which there is no uncertainty.

In Stromberg v. California, 283 U.S. 359, 367-68, 51 S.Ct. 532, 535, 75 L.Ed. 1117 (1931), the Supreme Court held that if the jury has been instructed to consider several grounds for conviction, one of which proves to be unconstitutional, and the reviewing court is thereafter unable to determine from the record whether the jury relied on the unconstitutional ground, the verdict must be set aside. Accord, Bachellar v. Maryland, 397 U.S. 564, 570-71, 90 S.Ct. 1312, 1315-16, 25 L.Ed.2d 570 (1970); Street

v. New York, 394 U.S. 576, 585-88, 89 S.Ct. 1354, 1362-63, 22 L.Ed.2d 572 (1969); Yates v. United States, 354 U.S. 298, 311-12, 77 S.Ct. 1064, 1072-73, 1 L.Ed.2d 1356 (1957). This settled principle of law applies with particular force in cases in which the death penalty has been imposed. Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), held that the death penalty may not be imposed under sentencing procedures that create a substantial risk that the penalty will be inflicted in an arbitrary and capricious manner. The Constitution requires that the sentencer's discretion be channeled by clear and objective standards that "make rationally reviewable the process for imposing a sentence of death." Woodson v. North Carolina, 428 U.S. at 303, 96 S.Ct. at 2990 (opinion of Stewart, Powell and Stevens, JJ.).

It is impossible for a reviewing court to determine satisfactorily that the verdict in this case was not decisively affected by an unconstitutional statutory aggravating circumstance. The jury had the authority to return a life sentence even if it found statutory aggravating circumstances. It is possible that even if the jurors believed that the other aggravating circumstances were established, they would not have recommended the death penalty but for the decision that the offense was committed by one having a substantial history of serious assaultive criminal convictions, an invalid ground. The presence of the unconstitutionally vague circumstance also made it possible for the jury to consider several prior convictions of petitioner which otherwise would not have been before it. The instruction on the invalid circumstance

may have directed the jury's attention to those convictions. It cannot be determined with the degree of certainty required in capital cases that the evidence of those convictions, together with the instruction, did not make a critical difference in the jury's decision to impose the death penalty.

[17] We hold that the jury's discretion here was not sufficiently channeled, see Godfrey v. Georgia, ___ U.S. ___, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), and that the process in which the death penalty was imposed in this case was not "rationally reviewable." Woodson v. North Carolina, 428 U.S. at 303, 96 S.Ct. at 2990. See also Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393. Petitioner's death sentence therefore cannot stand.

V. OTHER CONSIDERATIONS

In the brief filed by amicus curiae, NAACP Legal Defense and Educational Fund, the Court's attention is invited to three additional issues: (1) whether the trial judge should have ordered a competency hearing in light of petitioner's conduct at trial; (2) whether petitioner was denied effective assistance of counsel because of counsel's inability to communicate with him; and (3) whether petitioner's uncounseled confession was knowing and voluntary, in view of allegations that it was given while appellant was under the influence of drugs. These issues may relate to petitioner's murder conviction, but they were not considered by the district court. On remand, that court should take whatever action is appropriate with respect to those issues.

We reverse the district court's denial of habeas corpus relief insofar as it leaves standing the petitioner's death sentence, and the case is remanded for further proceedings.

REVERSED AND REMANDED.

THOMAS A CLARK, Circuit Judge, concurring in part and dissenting in part:

I concur in the relief grnated and all of the opinion except Part I which holds that there is no double jeopardy. It is my view that Stephens was placed in jeopardy for the offense of killing Asbell in Twiggs County under the holding of Potts v. State, 241 Ga. 67, 243 S.E.2d 510 (Ga.Sup.Ct.1978). In that case the court decided, under facts virtually identical to those in this case, that Potts could receive two death penalties, one in Cobb County for the kidnapping with bodily

injury of Priest and one in Forsyth County for the murder of Priest. In refuting Stephens' double jeopardy contention, the Georgia Supreme Court relied specifically on its holding in Potts. [1]

If Stephens had been tried in Twiggs County he could have received the death sentence in that county as well as in Bleckley County, where he was given the death sentence which is the subject of this appeal. The only difficulty Stephens has in asserting the bar of his prior conviction to the subsequent prosecution, however, is in the venue provisions of Georgia law, which purport to vest jurisdiction for criminal homicides in the county where the cause of death was inflicted. The majority concludes that

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1. Stephens v. Hopper, 241 Ga. 596, 247 S.E.2d 92, at 95 (1978).

these provisions, as construed by the Georgia courts, divested the Twiggs County court of jurisdiction over the offense for which he was later tried, and which Georgia law required to be tried only in Bleckley County. I do not agree.

It is clear that Stephens could have received the death penalty in Twiggs County for the offense to which he there plead guilty, the kidnapping-with-bodily-injury-resulting-in-death of Roy Asbell. Potts, supra, says so. It is equally clear that Stephens could not have received the death penalty for any offense, however Georgia defines that offense and wherever Georgia requires that offense to be tried, absent proof that the victim was killed in the commission of the crime. As I understand Georgia law, that state does not now impose the death penalty for any offense

not resulting in the death of the victim.[2] Since Georgia law does not recognize any

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2. Stanley v. State, 240 Ga. 341, 241 S.E.2d 173, 179-80 (1977). If a death penalty in Twiggs County could be said to be based solely on kidnapping with bodily injury not resulting in death, I think the penalty, as affirmed in Potts, would be unconstitutional under Coker v. Georgia, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977), and Eberheart v. Georgia, 433 U.S. 917, 97 S.Ct. 2994, 53 L.Ed.2d 1104 (1977), the latter of which set aside a death penalty for kidnapping with bodily injury as cruel and unusual punishment. A reading of the lower court opinion in Eberheart, 232 Ga. 247, 206 S.E.2d 12 (1974), does not make clear that he was charged with kidnapping with bodily injury, although there was a kidnapping and bodily injury. However, Justice Undercofler wrote the lower court opinion in Eberheart as well as the opinion in Collins v. State, 239 Ga. 400, 236 S.E.2d 759 (1977), where at 761, in referring to Eberheart, he recited that that earlier case had involved: "two death sentences for rape and kidnapping with bodily injury."

jurisdictional limitations on a court's power to punish as homicide a crime Georgia law does not call homicide, I do not feel any similar limitation on my duty to inquire whether the offenses are, within the meaning of the Constitution, the "same offense."

If Stephens could have received the death penalty under his Twiggs County indictment, as Potts clearly held that he could, it could only have been upon proof of the killing of the victim. Likewise, his subsequent prosecution for murder, under any theory of either malice or felony murder, would require proof that the victim was killed. [3]

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3. In this respect it is immaterial that Stephens recieved only a life sentence for that part of the kidnapping that occurred in Twiggs County, a punishment that might

That death, by whatever name called, is the greater, greatest, and ultimate offense. And that single offense cannot be the basis for several offenses that would permit the state to seek a separate death penalty for malice murder, felony murder, kidnapping with bodily injury murder, ad infinitum. Such reasoning tortures the

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3. (Cont.)
constitutionally attach to what happened in Twiggs County, taking no account of the killing that followed in Bleckley County. See note 2, supra. The fact remains that it was within the power of the Twiggs County court to punish for the Blackley killing, with a sanction reserved exclusively for killing. Jeopardy had attached, therefore, for the Bleckley County homicide when Stephens was brought to answer for that act in Twiggs County. The state needn't have more than one opportunity to punish for that killing, and the double jeopardy guaranty should prevent it.

meaning of "same offense" and the intent of forbidding the placing of a person twice in jeopardy for that same offense.

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE MIDDLE DISTRICT OF GEORGIA

MACON DIVISION

ALPHA OTIS O'DANIEL STEPHENS,	:	
Petitioner,	:	
v.	:	CIVIL ACTION NO. 79-30-MAC
SUPERINTENDENT WALTER ZANT, Georgia Diagnostic and Classification Center,	:	
Respondent.	:	

JUDGMENT

Pursuant to the Ruling of this Court dated and filed May 11, 1979, and for the reasons stated therein, the petition for a writ of habeas corpus is denied.

This 11th day of May, 1979.

WALTER F. DOYLE, Clerk

By: S/Helen F. Newberry
Helen F. Newberry
Deputy Clerk

Filed 10:00 a.m.,
May 11, 1979

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF GEORGIA

MACON DIVISION

ALPHA OTIS O'DANIEL STEPHENS,	:	
Petitioner,	:	
v.	:	CIVIL ACTION NO. 79-30-MAC
SUPERINTENDENT WALTER ZANT, Georgia Diagnostic & Classification Center,	:	
Respondent.	:	

RULING ON PETITION FOR WRIT OF HABEAS CORPUS

The petitioner Alpha Otis O'Daniel Stephens, a state prisoner under the death sentence for murder, seeks habeas corpus relief pursuant to 28 U.S.C.A. § 2254. Stephens was convicted and sentenced to death by the Bleckley County Superior Court and the verdict and sentence was affirmed by the Georgia Supreme Court.

Stephens v. State, 237 Ga. 259, 227 S.E.2d 261 (1976), cert. denied 429 U.S. 986, 97 S.Ct. 508, 50 L.Ed.2d 599 (1976). A prior state petition for habeas corpus was denied by the Tattnall County Superior Court, Stephens v. Hopper, No. 77-94 (Dec. 14, 1977), and this denial of relief was likewise affirmed by the Georgia Supreme Court. Stephens v. Hopper, 241 Ga. 596, 247 S.E.2d 92 (1978), cert. denied.

On February 8, 1979 this court stayed the impending execution so that this petition might be heard and decided. The petitioner alleges as grounds for relief that (1) the murder conviction is violative of the double jeopardy clause of the Fifth Amendment, (2) the closing arguments of the district attorney which allegedly contained prejudicial remarks was not transcribed; and (3) the imposition of the death penalty is violative of the peti-

tioner's Eighth and Fourteenth Amendment rights. All these grounds have been presented to the state tribunals; consequently exhaustion of state remedies is not an issue.

The circumstance which lead to petitioner's murder conviction began on August 19, 1974 when Stephens escaped from the Houston County jail where he was being held on other escape charges. He stole a car and went to Macon, Georgia where he stole another car and committed a burglary. On August 21, 1974 he went to the residence of Charles Asbell in Twiggs County and began burglarizing the house. Among the items he took was a .357 magnum pistol. As Stephens and his accomplice were burglarizing the home, Charles Asbell's father, Roy Asbell, drove up and asked the two men what they were doing. The petitioner, armed with the

pistol, assaulted Asbell by hitting and kicking him and took a large sum of money from him. The petitioner forced Asbell into his vehicle and drove him a short distance across the county line into Bleckley County where Stephens shot Asbell twice in the head, killing him. The petitioner drove Asbell's vehicle to Savannah and the next day was apprehended by Savannah police on other charges. He later confessed to a number of burglaries as well as the kidnapping and murder of Roy Asbell.

On October 14, 1974 the petitioner was indicted by the Twiggs County grand jury for the armed robbery and kidnapping-with-bodily-injury of Roy Asbell, as well as various burglary charges and the murder of one Louise Mercer. Among the assaultive acts alleged in connection

with the kidnapping-with-bodily-harm charge was that Stephens shot and killed the victim. The petitioner pled guilty to all offenses and was sentenced to three consecutive life sentences as well as various other terms. In November, Stephens was indicted by the Bleckley County grand jury for the murder of Roy Asbell. Following a plea of not guilty he was tried, convicted and sentenced. The death sentence was imposed after the jury found that the murder was committed by a person with a prior conviction for a capital felony, by a person with a prior history of serious assaultive criminal convictions and by a person who had escaped from the lawful custody of a peace officer and place of lawful confinement. Ga. Code Ann. § 27-2534.1(b). The Georgia Supreme Court set aside the death penalty on account of prior assaultive

convictions but otherwise affirmed the conviction and death sentence. Stephens v. State, supra.

I. FORMER JEOPARDY

The petitioner argues that his guilty plea to kidnapping-with-bodily-harm (Ga. Code Ann. § 26-1311) in Twiggs County is a bar to prosecution for murder in Bleckley County on the grounds that the kidnapping and murder charges arose from the same acts and the homicide of Asbell was one of the acts of bodily harm in the kidnapping indictment. The Georgia Supreme Court rejected this argument reasoning that there was no procedural bar to the murder prosecution since Stephens could not be tried in Twiggs County for a murder that took place in Bleckley County. The court also held that there was no substantive bar to the prosecution because kid-

napping-with-bodily-injury and murder are not included offenses and are established by the proof of different facts. Stephens v. Hopper, supra. This court defers to the Georgia Supreme Court's decision insofar as it rests on a construction of state law; however, this court must decide the question measured against the Fifth Amendment's double jeopardy prohibition.

The double jeopardy clause of the Fifth Amendment provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." This clause has been incorporated into the due process clause of the Fourteenth Amendment and constitutes a limitation on the states' power. Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970). As explained by the United States Supreme Court:

". . . where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not."

Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed.2d 306, 309 (1932). See also Brown v. Ohio, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977), United States v. Smith, 574 F.2d 308 (5th Cir. 1978).

This court is convinced that the double jeopardy prohibition has not been violated. The kidnapping-with-bodily-harm and the murder charge are offenses defined by separate statutes with different

elements. In Georgia, kidnapping-with-bodily-harm requires the prosecution to show that the defendant abducted another person without legal authority and held the person against his will and in addition requires that the victim have received bodily injury from the abduction. Ga. Code Ann. § 26-1311. Murder, on the other hand, is the unlawful taking of the life of another with malice aforethought. Ga. Code Ann. § 26-1101. Clearly then, the two offenses require proof of different facts and are not the same within the meaning of the Fifth Amendment. The petitioner, nevertheless, argues that because the killing of Asbell was included as one of the acts of bodily injury in the kidnapping indictment jeopardy attached with the petitioner's guilty plea. This argument is without merit. The double jeopardy clause requires the

court to examine the elements of the offenses and to determine what facts are necessary to sustain a conviction. Homicide is not a necessary element of kidnapping-with-bodily-injury. Furthermore, the kidnapping-with-bodily-injury charge was adequately supported by the allegations of beating, hitting, and kicking set forth in the indictment.

II. ABSENCE OF TRANSCRIPT OF DISTRICT ATTORNEY'S CLOSING ARGUMENT

The petitioner alleges that the district attorney made prejudicial remarks during the closing argument and that the court failed to have the argument transcribed. He alleges that the court failed to have the voir dire transcribed. At the state habeas hearing the respondent produced the affidavit of the trial judge who stated that at the time of the trial

it was the practice of his circuit not to transcribe voir dire or arguments of counsel absent a request and that no request was made by either of petitioner's attorneys despite the fact both knew of the rule. The trial judge also stated that the district attorney "made no allusions to race nor did he use any epithet in referring to" the petitioner. He recalled no prejudicial or inflammatory statements.

The petitioner has failed to demonstrate any error that would form the basis for habeas relief.

III. THE DEATH PENALTY WAS NOT IMPOSED CONTRARY TO THE EIGHTH AND FOURTEENTH AMENDMENTS

The United States Supreme Court has upheld Georgia's statutory scheme for the imposition of the death sentence against

a constitutional attack under the Eighth and Fourteenth Amendments. Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). All the procedures set forth in those statutes were observed in this case. The jury found beyond a reasonable doubt two statutory aggravating circumstances that the murder was committed by a person with a prior record for a conviction of a capital felony, Ga. Code Ann. § 27-2534.1(b)(1), and by a person who had escaped from lawful custody of a police officer. Ga. Code Ann. § 27-2534.1(b)(9). These findings are supported by the evidence and either finding is grounds for the imposition of the death sentence. On mandatory review to the Georgia Supreme Court, Ga. Code Ann. § 27-3537, the court held that the sentence was not the result of passion or caprice nor was the sentence "excessive or dis-

proportionate to the penalty in similar cases considering both the crime and the defendant." This court must agree with these conclusions.

Accordingly, the petition for a writ of habeas corpus is hereby denied.

The stay of execution issued on February 8, 1979 shall remain in force and effect until such time as respondents move for dissolution on account of petitioner's failure to appeal or affirmance after appeal.

SO ORDERED, this 11th day of May, 1979.

S/Wilbur D. Owens, Jr.
Wilbur D. Owens, Jr.
United States District Judge

Filed at 10:00 a.m.,
May 11, 1979.

ALPHA OTIS O'DANIEL STEPHENS,

Petitioner-Appellant,

v.

WALTER ZANT, SUPERINTENDENT,

Respondent-Appellee.

No. 79-2407.

United States Court of Appeals,
Fifth Circuit.

June 18, 1981.

Appeal from the United States District Court for the Middle District of Georgia.

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion November 26, 1980, 5 Cir., 1980, 631, F.2d 397).

Before INGRAHAM, RONEY and THOMAS A. CLARK, Circuit Judges.

PER CURIAM:

Upon consideration of the petition for rehearing filed by the appellee, we delete the following sentence that appears in 631 F.2d 397 on page 406, column 2, line 10:

> The presence of the unconstitutionally vague circumstance also made it possible for the jury to consider several prior convictions of petitioner which otherwise would not have been before it.

The two sentences immediately following the above sentence at page 406 of the slip opinion are modified to read as follows:

> The instruction on the invalid circumstance may have unduly directed the jury's attention to his prior convictions. It cannot be determined with the

degree of certainty required in capital cases that the instruction did not make a critical difference in the jury's decision to impose the death penalty.

The petition for rehearing is DENIED. No member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition for rehearing en banc is DENIED.